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ARJUN DAS KUNDU *v.* MARCHIYA TELINEE, (1936) [1937] 1 Cal. 127.

This case raises an interesting point of Insolvency law which has not been the subject of decision before. The case was one governed by the Provincial Insolvency Act. A person who had practically no assets was adjudged insolvent. As she had no property, there was no vesting order in any Receiver, nor did any creditor submit any proof. She was given absolute discharge. After the discharge, one of the creditors wanted to prove in respect of his debts, as the insolvent got some property by some litigation pending the insolvency. The question was whether the creditor could be allowed to prove after the order of final discharge. The learned Judge has held that he could and also the other creditors, as long as there were properties of the insolvent.

Though the conclusion seems to be reasonable that the insolvent's properties which belonged to the insolvent prior to the discharge should be available to the creditors, the provisions of the Provincial Insolvency Act on the point are by no means clearly in favour of the learned Judge's view. In coming to the conclusion, the learned Judge has relied on the view of the Vaughan Williams, L. J., in In re *McMurdo*: *Penfield* v. *McMurdo*[1], where the Lord Justice said that in the English Bankruptcy Practice a creditor could come in and prove at any time during the administration so long as he did not interfere with the prior distribution of the estate. It must be observed at the outset that it was not a case of a creditor

1. (1902) 1 Ch. 684 at p. 699.

coming in to prove after the discharge of the bankrupt. The effect of a discharge under the English Bankruptcy Acts and the Indian Acts is that the bankrupt is released from certain classes of provable debts. As observed by Sir Dinshaw Mulla in his Tagore Law Lectures on the Law of Insolvency, at p. 278, the effect of a final discharge is to wipe out such debts. It is not merely as under the Limitation Act that the remedy is lost but the debt is extinguished. *See* Williams on Bankruptcy, 13th Edition, p. 131. Cf. *Kathayyan Chettiar* v. *Govindaswami Chettiar*[1]. Speaking of the effect of the discharge under the Bankruptcy law, Lord Blackburn observed in *Thompson* v. *Cohen*[2] that as the word used was "released", the debt was gone. In the face of the above statements of the law, we are not sure that the learned Judge has given full effect to the terms of S. 44 of the Provincial Insolvency Act when he observes that the effect of a discharge is that the insolvent is no longer personally liable, but the properties are still liable for the debts. In this connection, we must notice a single Judge's decision of the Madras High Court in *Doraisami Pillai* v. *Arumuga Naicker*[3], which was argued *ex parte* where it was held that the properties of an insolvent which had passed into the hands of a third person were liable for the insolvent's provable debts after his discharge. We venture to submit that the Madras decision does not give effect to the word "release" in S. 44 which as pointed out above means that the debts are wiped out or extinguished.

Again, the decision of Vaughan Williams, L.J. in In re *McMurdo*: *Penfield* v. *McMurdo*[4], relied on by the learned Judge was not given under any English rule of law corresponding to S. 33 (3) of the Provincial Insolvency Act. In the English law, a creditor has to submit his proof as soon as may be after the receiving order. This corresponds to the provision in the Presidency Towns Insolvency Act, Schedule II, R. 1 with the alteration that under the latter, it is the date of the order of adjudication and not the receiving order. This rule has been held to be directory by reason of the English practice in Bankruptcy. It is not clear that there is any practice in this country under the Provincial Insolvency Act which fixes a

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1. (1931) 35 L.W. 449.
2. (1872) L.R. 7 Q.B.C. 527 at p. 532.
3. (1935) 69 M.L.J. 799.
4. (1902) 1 Ch. 684.

specific date within which proofs have to be submitted under S. 33 (3). The time fixed is the date of discharge. This provision has been understood by the Indian decisions as referring to final discharge. (*Babu Lal Sahu* v. *Krishna Prashad*[1], and *Sivasubramania Pillai* v. *Theethiappa Pillai*[2]). There is a division bench of the Calcutta High Court itself which has taken the same view later than the one under notice. (*Nazar Khan* v. *Barrclough*[3].). *Cf.* Mulla's Insolvency, p. 219. The view of the learned Judge in the case under notice is contrary to all of them. It is a matter for consideration whether the Provincial Insolvency Act has not in this section made a deliberate departure from the English and Presidency Towns Insolvency Acts by fixing a specific date for tendering proofs of claims.

The learned Judge has relied on the effect of S. 64 of the Provincial Insolvency Act relating to a final dividend. It is open to question how far the argument based on the consequences flowing from S. 64 will outweigh the effect of the provisions directly bearing on the point.

BIJAY KUMAR ADDHYA *v.* NAGENDRA NATH PALIT, (1936) [1937] 1 Cal. 1 (F.B.).

This decision brings the view of the Calcutta High Court in line with that of the other High Courts on the question whether a notification "that the Munsifs of Alipore are vested with power to try, under the Small Causes Court procedure, suits for the recovery of rent, etc.", complies with the requisites of clause 8, second schedule of the Provincial Small Cause Courts Act. The High Courts of Madras and Bombay have taken the view that a similar notification complies with the requirements of the clause and the Munsif or Sub-Judge need not be referred to by name. *Soundaram Ayyar* v. *Sennia Naicken*[4], *Ramkrishna Yeshwant* v. *The President of the Vengurla Municipality*[5] and *Sankar Rana Patil* v. *Jagannath Mathura Lal*[6]. There was a conflict of views in the Calcutta

1. (1924) I.L.R. 4 Pat. 128.
2. (1923) 45 M.L.J. 166: I.L.R. 47 Mad. 120.
3. A.I.R. 1936 Cal. 807.
4. (1900) 10 M.L.J. 329: I.L.R. 23 Mad. 547 at p. 555 (F.B.).
5. (1916) I.L.R. 41 Bom. 367.
6. A.I.R. 1928 Bom. 265.

High Court between *Safer Ali Mondal* v. *Golam Mondal*[1] and *Akshoy Kumar Shaha* v. *Hira Ram Dosad*[2]. In one of these cases Sir Asutosh Mookerjee and Beachcroft, JJ., held that the rule required that the notification should from time to time refer to the Munsif or Sub-Judge by name and authorise him to try suits for rent as small cause suits. There does not seem to be warrant for such a strict construction of the rule as a Munsif or Sub-Judge is a Judge of a Court of Small Causes within the meaning of the rule. Sir Lawrence Jenkins, C.J. and N. R. Chatterjee, J. in *Akshoy Kumar Shaha* v. *Hira Ram Dosad*[2] took a view contrary to the one in *Safer Ali Mondal* v. *Golam Mondal*[1] and in conformity with that held in Madras and Bombay. This view has been affirmed and *Safer Ali Mondal* v. *Golam Mondal*[1] has been overruled by the Full Bench of the Calcutta High Court in this case.

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1. (1915) 19 C.W.N. 1236.
2. (1914) 19 C.W.N. 1238 (f.n.).

Bai Saroobai *v.* Hussein Somji Merchant, (1936) I.L.R. (1937) Bom. 18 (F.B.).

It would have been much more satisfactory if the important question of law raised and decided in this case had been referred to a Fuller Bench. It had been taken to be a well-settled rule of Mahomedan Law that under the Hanafi system, a gift of a life-estate operated legally to confer an absolute estate on the donee, on the principle that 'the gift was good and the condition was void'. Doubts were cast on this position by the decision of the Privy Council in *Amjad Khan* v. *Ashraf Khan*[1]. The question was again considered by the Bombay High Court in *Rasoolbibi* v. *Usuf Ajam Piperdi*[2] where however the two Judges differed. One Judge held that the Privy Council decision must be taken to have definitely overruled the earlier view, while the other Judge heldthat the decision left the question untouched. The present Full Bench deals with the question again but the two Judges who had taken differing views adhere to their respective opinions previously given. The decision of the Full Bench is practically that of the third Judge who agrees with the view that the Privy Council decision has overruled the earlier Indian decisions to the contrary.

According to this view, therefore, the gift of a mere life-estate cannot be taken to be a gift of tangible property with a condition attached to it, so as to let in the rule that in all cases the legal effect is to vest an absolute estate in the donee. The question will still be what was the intention of the settlor or donor, having regard to the whole of the document. If the settlor never intended to vest the absolute estate in the donee, that intention will prevail, and the rule will not operate to defeat that intention. The further question which was left open by the Judicial Committee whether the life-estate attempted to be created will be valid even as a life-estate is decided by the Full Bench in the affirmative.

It should however be noted that the majority view as laid down above will have the effect of affecting many titles and transactions that must have taken place, on the faith of the earlier decisions. The dissenting judgment points out that the

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1. (1929) 57 M.L.J. 439: L.R. 56 I.A. 213: I.L.R. 4 Luck. 305 (P.C.).
2. (1933) I.L.R. 57 Bom. 737.

Privy Council decision is not inconsistent with the earlier decisions. It is somewhat difficult to appraise exactly what their Lordships mean and it is hardly satisfactory that their pronouncement should not have been clearer. The Madras High Court held in *Alimamma* v. *Amade Beari*[1] that the Privy Council decision could be distinguished by referring to the reverter clause in the particular document which they were considering and the learned Judge was not prepared to hold that the earlier decisions were really overruled in the absence of a definite pronouncement by the Privy Council.

Having regard to the importance of the point raised and the many titles that will be affected, it would be more satisfactory if the matter is decided by a Fuller Bench.

In re AN ADVOCATE, (1936) I.L.R. (1937) Bom. 99.

Applications for re-instatement by legal practitioners whose names have been struck off the rolls for professional misconduct, must in the nature of things be rare. The decision under notice should be welcomed as stating in careful and unexceptionable terms, the principles which ought to guide the Courts when dealing with such applications. Striking off the rolls is merely a punishment and is really in the nature of a suspension and not necessarily an exclusion for ever. The decision is valuable as giving a guidance as to the materials which should be placed before the Court in such cases so as to satisfy the test laid down. Instances of such applications are collected in the decision of the Calcutta High Court reported in In re *Abiruddin Ahmed*[2].

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1. (1929) 58 M.L.J. 571. 2. (1910) I.L.R, 38 Cal. 309.

SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* JAY NARAYAN CHANDRA, (1936) [1937] 1 Cal. 160.

The question in this case is one of considerable interest to the subject, as the learned Judge has himself observed in the opening passage of the judgment. Some properties vested in executors were acquired under the Land Acquisition Act. The Collector erroneously, though *bona fide,* thought that the executors had no power to alienate the properties and consequently deposited the amount awarded into the Court and took possession of the properties. The question was whether the executors were entitled to interest on the amount till it was paid over to them. The learned Judge has answered the question in the negative.

We venture to think that if this conclusion is right, the subject under a compulsory purchaser is deprived both of the enjoyment of his land and the interest on the amount awarded for it for no default of his. In the first place, it must be noticed that where a subject is dispossessed under a compulsory acquisition, he is entitled to interest on the amount awarded from the date of the Crown taking possession of the properties unless there is anything in any statute to deny him that right. This was clearly pointed by their Lordships of the Privy Council in *Inglewood Pulp and Paper Co.* v. *New Brunswick Electric Power Commission*[1]. It is really a branch of the ordinary law as between vendors and purchasers by which the purchaser has to pay interest on the purchase money from the time when he takes possession of the property. *See* S. 55 (4) (*b*) of the Transfer of Property Act which re-enacts the pre-existing law. This rule has been applied in England to cases of compulsory acquisition of land. (See *Swift and Company* v. *Board of Trade*[2], In re *Pigott and the Great Western Railway Company*[3] and *Fletcher* v. *Lancashire and Yorkshire Railway Company*[4].) Therefore the observation of the learned Judge in this case that the liability to pay interest is statutory is open to question, if it is meant thereby that in the absence of statutory provision, the subject is not entitled to interest on the compensation from the date when possession is taken. (See *Inglewood Pulp and Paper Co.* v. *New Brunswick Electric Power Commission*[1] referred to above.) Reference

1. (1928) A.C. 492.
2. (1925) A.C. 520 at 532.
3. (1881) 18 Ch. D. 146.
4. (1902) 1 Ch. 901.

may also be made in this connection to *Vallabhdas Naranji* v. *Development Officer, Bandra*[1] and *The Revenue Divisional Officer, Trichinopoly* v. *Venkatarama Aiyar*[2] where interest has been given on the amount awarded apart from any provision in the Land Acquisition Act.

Then we have to turn to see whether the right to interest has been taken away by anything contained in the Land Acquisition Act. S. 34 of the Act has no such effect, as according to the learned Judge himself it only refers to a deposit contemplated by S. 31 (2) of the Act. S. 31 (2) has only reference to a case where there is in fact no person competent to alienate the land and not where the Collector believes mistakenly that there is no one competent to alienate the land. If therefore under a mistake, the Collector deposits the amount into the Court, when the owner is willing to receive it, there seems to be no reason in principle or under the statute why he should be deprived of the right to interest when he has been dispossessed of the property under a compulsory sale.

MANMATHA KUMAR SHAHA *v.* EXCHANGE LOAN COMPANY, LTD., (1936) [1937] 1 Cal. 283.

In this case, the learned Judge has taken a bold line in the cause of justice and directed a minor to repay in a suit by the creditor the amount of the loan which he borrowed by fraudulently representing that he was an adult. This decision is said to have been based on the equitable rule laid down in S. 41 of the Specific Relief Act. In coming to this conclusion, the learned Judge has followed the Full Bench decision in *Khan Gul* v. *Lakha Singh*[3] which dissents from the decision of the English Court of Appeal in *R. Leslie, Ltd.* v. *Sheill*[4] where the whole question was considered by Lord Sumner who delivered the leading judgment and which was followed by the Privy Council in *Mahomed Syedol Ariffin* v. *Yeoh Ooi Gark*[5]. That S. 41 is no new head of equity but is only an enactment of the old English rule that one who seeks equity must do equity is pointed out by the Privy Council in *Mohori Bibee* v. *Dharmo-*

1. (1929) 57 M.L.J. 139: L.R. 56 I.A. 259: I.L.R. 53 Bom. 589 (P.C.).
2. (1935) 71 M.L.J. 69: I.L.R. 59 Mad. 433.
3. (1928) I.L.R. 9 Lah. 701 (F.B.). 4. (1914) 3 K.B. 607.
5. (1916) 2 A.C. 575.

das Ghose[1]. The minor does not seek any equitable remedy in the suit for him to be put on terms. Further as pointed out by the Privy Council in the same case from the passage in *Thurstan* v. *Nottingham Permanent Benefit Building Society*[2]. " A Court of Equity cannot say that it is equitable to compel a person to pay any moneys in respect of a transaction which as against that person, the legislature has declared to be void."

It is however worthy of consideration whether the decision of the learned Judge may not with greater justification be rested on S. 65 of the Indian Contract Act. By reason of the fraudulent representation as to age by the infant at the time of the transaction, the void nature of the agreement was discovered only later by the creditor. It is then a clear case for the application of the provisions of S. 65 of the Indian Contract Act and the minor is bound to make compensation under the statute, even if not under any rule of equity. The only difficulty in the way of the application of the section is the loose observation by the Privy Council in *Mohori Bibee* v. *Dharmodas Ghose*[1] that S. 65 starts from the basis of there being an agreement between competent parties and has no application to a case where there never was and never could have been any contract. If this passage is understood as an authority for the proposition that in cases of agreements void *ab initio*, S. 65 has no application, this is clearly opposed to a later Privy Council decision in *Harnath Kunwar* v. *Indar Bahadur Singh*[3] where the question has been considered more fully. See also *Annada Mohan Roy* v. *Gour Mohan Mullick*[4]. The void nature of an infant's agreement does not stand in any different footing and there is nothing in S. 65 which exempts such agreements from its scope. We are aware that the observations of the Privy Council in *Mohori Bibee* v. *Dharmodas Ghose*[1] have been followed in *Motilal Mansukhram* v. *Maneklal Dayabhai*[5] and *Punjabhai* v. *Bhagwandas*[6] but the learned Judges in these cases did not examine closely the observations of their Lordships of the Privy Council in *Mohori Bibee* v. *Dharmo-*

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1. (1903) L.R. 30 I.A. 114 at 124: I.L.R. 30 Cal. 539 (P.C.)
2. (1902) 1 Ch. 1 at 13.
3. (1922) 44 M.L.J. 489: L.R. 50 I.A. 69: I.L.R. 45 All. 179 (P.C.).
4. (1923) 45 M.L.J. 617: L.R. 50 I.A. 239: I.L.R. 50 Cal. 929 (P.C.).
5. (1920) I.L.R. 45 Bom. 225.
6. (1928) I.L.R. 53 Bom. 309.

das Ghose[1]. The matter was fully examined by Reilly, J., in *Appaswami Aiyangar* v. *Narayanaswami Aiyar*[2] where the learned Judge critically examines them and holds that they cannot be followed in view of the later decision of the Privy Council in *Harnath Kunwar* v. *Indar Bahadur Singh*[3]. In the interests of justice, this view of Mr. Justice Reilly is entitled to careful consideration.

On the other question in the case as to whether a minor is estopped by reason of his representation that he was of full age in respect of an agreement by him, all the High Courts are now agreed that there can be no estoppel as against him. The earlier decisions are collected in *Khan Gul* v. *Lakha Singh*[4] and even the Bombay High Court which took the contrary view has overruled its prior decisions in the Full Bench case of *Gadigeppa Bhimappa* v. *Balangauda Bhimangauda*[5] and has agreed with the other High Courts. The observations of the Privy Council in *Nawab Sadiq Ali Khan* v. *Jai Kishori*[6] are also to a similar effect.

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1. (1903) L.R. 30 I.A. 114 at 124: I.L.R. 30 Cal. 539 (P.C.).
2. (1930) 60 M.L.J. 117: I.L.R. 54 Mad. 112.
3. (1922) 44 M.L.J. 489: L.R. 50 I.A. 69: I.L.R. 45 All. 179 (P.C.).
4. (1928) I.L.R. 9 Lah. 701 (F.B.).
5. (1931) I.L.R. 55 Bom. 741 (F.B.). 6. (1928) 55 M.L.J. 88 (P.C.).

CALCUTTA IMPROVEMENT TRUST *v.* POORNA CHANDRA SINGHA, (1936) [1937] 1 Cal. 300.

In this case, a mortgage deed provided that interest at 6½ per cent. per annum should be paid, if the original rate of interest at 6 per cent. was not paid for fifteen days after it became due and the learned Judge has held that the provision for the higher rate was penal and felt compelled to award the lower rate.

There is no doubt that as the learned Judge points out the mortgage deed was inefficiently drafted. If, on the other hand, the document provided that interest was payable at 6½ per cent. but if it was paid within 15 days of the due date, the interest should only be 6 per cent. per annum, the higher interest would have been awarded in case of default and could not be considered penal in law, though as pointed out by the House of Lords in *Wallingford* v. *Mutual Society*[1] and by Jessel, M.R., in *Wallis* v. *Smith*[2], the distinction between both the classes of cases is irrational. This distinction which has been characterised in strong terms by the greatest judges in England has been introduced into this country and adopted by all the High Courts and by the Privy Council in *Kulada Prosad Chowdhury* v. *Ramananda Pattanaik*[3], *Maung Thu Ka* v. *U Thunanda*[4], *Kutub-ud-din Ahmad* v. *Bashir-ud-din*[5], *Fakir Mahomed* v. *Rangiah Goundan*[6], *Fitz-Holmes* v. *Bank of Upper India, Ltd.*[7], *Burjorji Shapurji* v. *Madhavlal Jesingbhai*[8] and *Mati Lal Das* v. *The Eastern Mortgage and Agency Co., Ltd.*[9]

In the present case, it is difficult to see why the learned judge felt that he was powerless to award the higher rate. The original rate was 6 per cent. and the rate in case of default was only 6½ per cent. Under these circumstances, it is for the Court to decide, as a question of fact, whether the higher rate was or was not intended to be enforced and merely *in terrorem*. It has to be noticed that the explanation to S. 74 of the Indian Contract Act only enacts that the enhanced rate *may* be penal and not *shall* be by way of penalty. That the higher rate is not necessarily penal under S. 74 under such circumstances has been laid down in *Abbakke Heggadthi* v. *Kinhiamma Shetty*[10],

1. (1880) 5 A.C. 685 at 702.
2. (1882) 21 Ch. D. 243 at 261.
3. (1921) I.L.R. 48 Cal. 1036.
4. (1927) I.L.R. 5 Rang. 371.
5. (1910) I.L.R. 32 All. 448.
6. (1913) 1 L.W. 181.
7. (1923) I.L.R. 4 Lah. 258.
8. (1934) I.L.R. 58 Bom. 610.
9. (1920) 25 C.W.N. 265 (271) (P.C.).
10. (1906) I.L.R. 29 Mad. 491.

Sivagnanam Servaigar v. *Ramaswamy Chettiar*[1], *P. C. Paul* v. *K. A. L. R. Firm*[2], *Chuni Lal* v. *Munna Lal*[3], and *Abdul Gani* v. *Nandlal*[4]. In the circumstances of this case, it is doubtful whether the higher rate of interest of half a per cent. a year is at all penal.

Again even if the higher rate is penal, under S. 74 it is perfectly open to the Court to award even the higher rate which is fixed in the document by way of reasonable compensation as it has been awarded in a number of cases. (See *Sundar Koer* v. *Rai Sham Krishen*[5].) We are not sure whether these aspects of the matter were presented before the learned Judge in the decision of the case.

EMPEROR *v.* CHHOTALAL AMARCHAND, I. L. R. (1937) Bom. 183 (F.B.).

This Full Bench decision overrules the earlier decision of the Court in *Abdulsatarkhan* v. *Ratanlal*[6] which followed the Madras decision in *Ruppell* v. *Ponnuswami Thevan*[7] in preference to the Calcutta view in *Nagendranath Shaha* v. *Emperor*[8]. The question turned upon the proper construction of S. 15 of the Indian Merchandise Marks Act. The three years' limitation period for the prosecution of the offence laid down in that section starts from the date of the commission of the *offence charged* and not from the date of the first of the series of similar offences even in cases of a continuous infringement of a trade mark. No doubt this construction involves that a recent and later infringement well within the time-limit may be made the subject of the complaint, even though the complainant has been quiet for more than the statutory period after the infringement originally started. But the difficulties and anomalies of the contrary construction are greater, as pointed out in this judgment and there is really no reason for not reading the section literally without introducing additional words. Even the Madras High Court has in a more recent case taken a similar view and has not followed the earlier decision, see *Md. Ahmad* v. *Venkanna*[9].

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1. (1911) 22 M.L.J. 85 (105).
2. (1923) I.L.R. 1 Rang. 460: A.I.R. 1924 Rang. 46.
3. (1930) I.L.R. 11 Lah. 635.
4. (1902) I.L.R. 30 Cal. 15.
5. (1906) 17 M.L.J. 43: L.R. 34 I.A. 9: I.L.R. 34 Cal. 150 (P.C.).
6. (1935) I.L.R. 59 Bom. 551.
7. (1899) I.L.R. 22 Mad. 488.
8. (1929) I.L.R. 57 Cal. 1153.
9. A.I.R. 1931 Mad. 276.

THE COMMISSIONER OF INCOME-TAX, BOMBAY PRESIDENCY *v.* MRS. PIROJBAI, I. L. R. (1937) Bom. 310.

Income may have escaped assessment within the meaning of S. 34 of Income-tax Act even where no assessment proceedings were started at all against the assessee in the previous year, and no notice under S. 22 was served on him. The language is general and would take in all cases where, whatever the cause, the income has actually escaped assessment. There is no good reason why the case of an individual assessee should differ in this respect from the cases of a company which has a statutory duty to make a return of income even without a notice. The expression 'escape' no doubt premises a pursuit from which an escape is contemplated, but this is sufficiently met by the circumstance that every individual who receives the taxable minimum of income is liable in law to be taxed.

MAHARAJA SIR KESHO PRASAD SINGH *v.* BAHURIA MUSAMMAT BHAGJOGNA KUER, (1937) I. L. R. 16 Pat. 258 (P.C.).

This decision of the Board is important as it discusses once again the question how far a judgment not *inter partes* is relevant and admissible under the Indian law and what probative value it has in different circumstances. The rule that so far as regards the truth of the matter decided a judgment is not admissible evidence against one who is a stranger to the suit is, as stated by their Lordships, accepted as a general rule under English law. The Indian law is the same. In some cases however a judgment whether it is a transaction or not within the meaning of S. 13, cl. (*a*) may be evidence of an assertion of a right under that section but in such cases its probative value may vary considerably according to circumstances. Instances of cases where judgment was relied on as evidence of possession either at a particular date or of ancient possession in some cases can be seen in such cases as *Denomoni* v. *Brojo*[1] and *Ram Ranjan Chuckerbutty* v. *Ram Narain Singh*[2].

But ordinarily as evidence of mere assertion of an alleged right a judgment has not much significance and stands on the same footing as a plaint. If the party lost the case, the un-

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1. (1901) 12 M.L.J. 83: L.R. 29 I.A. 24: I.L.R. 29 Cal. 187 (P.C.).
2. (1894) 5 M.L.J. 7: L.R. 22 I.A. 60: I.L.R. 22 Cal. 533 (P.C.).

successful judgment is practically useless and even where he has won, the probative value will be greatly discounted where there has been equally assertions of right by the present opponents.

In the present decision, a mere assertion that a person not in possession of the land in suit at the time of the suit claimed several years ago to have had possession from sometime past is not serious evidence of his right. As pointed out by the Judges no real inference bearing on the present rights of parties could be drawn from such circumstance and it will not be sufficient even to shift the burden of proof. In almost all cases, even to the extent to which judgment *inter partes* is strictly admissible, other documents, like the plaint or decree will be found to be sufficient and the judgment is unnecessary to be put in. The attempt is always to get the judgment into the record, not for establishing mere assertion but really for relying on the truth of the findings contained in the same. Here the law is clear that such findings are absolutely inadmissible and should not be looked at.

Another point of importance decided by this case is as to the proper presumption relating to possession in cases where a title is transferred. It is not correct to say that unless the purchaser shows that he took delivery of possession that there is a presumption that the vendor continued in possession. It is for the vendor to establish that he continued in possession adversely to the right of the purchaser by showing receipt of rent or enjoyment, for a period subsequent to the transfer of title.

VENKATAPATHI RAJU *v.* VENKATANARASIMHA RAJU, (1936) 71 M.L.J. 558: L.R. 63 I.A. 397: I.L.R. 1937 Mad. 1 (P.C.).

Renunciation by a member of the joint Hindu family merely extinguishes his interest in the estate and does not affect the status of the remaining members quoad the family property. The separation of one member may have the effect of separation of others *inter se* when it becomes necessary to fix the shares of others in order to determine the share of the separating member subject however to the question whether they have agreed to remain united or to reunite. (*Palani Ammal* v. *Muthuvenkatachala Moniagar*[1].) Such definements of shares is obviously unnecessary when there is only a renunciation by a member. Division of status by reason of a declaration by a member is also similar in character except in the case of a head of branch expressing his determination to be divided which will take away his descendants along with him. (*Ramalinga Annavi* v. *Narayana Annavi*[2].) The father of a joint family has a further right, namely, of disrupting the family at any time during his lifetime without the consent of the sons and if he makes a division it has the effect of separating not only the father from the sons but also the sons *inter se*. A division of right or severance of joint status may result not only by an agreement between the parties but also from any act or transaction which has the effect of defining their shares in the estate. The Madras High Court in this case did not hold differently but they held having regard to the fact that there was very little ancestral property and the property consisted only of certain businesses which stood separately in the names of brothers and in respect of which each had expressed that the others had no interest. This the Madras High Court held, showed that they were only tenants in common. The High Court agreeing with the Court of the instance held however that this statement that the others had no interest was false and was made with a view to get rid of the inconvenient consequences of the contrary position, the businesses in question being respectively arrack and toddy businesses. In view of their Lordships' finding that the family had only a house, and the subsequent acquisitions were apparently only self-acquisitions,

1. (1924) 48 M.L.J. 83: L.R. 52 I.A. 83: I.L.R. 48 Mad. 254 (P.C.).
2. (1922) 43 M.L.J. 428: L.R. 49 I.A. 168: I.L.R. 45 Mad. 489 (P.C.).

the mere conclusion that the family was joint did not have the effect of making the property joint family property necessarily. According to *Suthersanam Maistri* v. *Narasimhulu Maistri*[1] such property if jointly acquired would *prima facie* be joint family property but it is open to members of the family to treat themselves as tenants-in-common. According to the High Court the admission was sufficient indication to show that the businesses were individual businesses and the acquisitions with the income would retain such character though enjoyed by the brothers together. Their Lordships proceed apparently on the view that the only question was whether the brothers were joint or separate. This does not seem to be the right way of proceeding.

MURUGESAM PILLAI *v.* MINAKSHISUNDARA AMMAL, (1936) 71 M.L.J. 831: L.R. 63 I.A. 429: I.L.R. 1937 Mad. 94 (P.C.).

Under a compromise it was provided that the minor plaintiff should be paid Rs. 3,000 future mesne profits of his share and Rs. 12,000 agreed to be paid by the defendant out of affection in all Rs. 15,000 on his executing a receipt within six months of his attaining majority. He died before attaining majority. His heir applied within three years of his attaining majority for the amount. Two questions were raised: (*i*) that the right was personal and was conditional on the minor attaining majority, (*ii*) by reason of S. 17 (1) of the Limitation Act the right was barred, the application being more than three years after the death of the minor though within three years of his death. Their Lordships repelled both the contentions. As regards the first point having regard to the fact that the claim of Rs. 3,000 was in respect of an undoubted right of the plaintiff, their Lordships held that the minor attaining age could not be regarded as a condition but merely indicated the time when payment should be made. In that view their Lordships held that the right to the money accrued only on the date when the minor would, in the course of nature, attain majority and the application being within three years of that point of time, it was in time. S. 17 (1) which provides that the suit should be brought within three

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1. (1901) 11 M.L.J. 353: I.L.R. 25 Mad. 149.

years applies only to cases where the cause of action has already accrued. It is a limitation on the right of the plaintiff and does not accelerate his right of suit or curtail the right of defence of the defendant to a suit brought in respect of a cause of action on the ground that the right has not yet accrued.

SHUKRULLAH *v.* ZOHRA BIBI, (1936) L.R. 64 I.A. 1: I.L. R. 1937 All. 1 (P.C.).

This is an important case as regards practice. When there is a compromise of an appeal pending before the Privy Council, and a minor is involved, their Lordships lay down that the matter should be placed before the High Court and the Court should be made to certify whether in its opinion the proposed compromise is or is not for the benefit of the minor.

MAGAN LAL MARWARI *v.* SITARAM PANNA LAL, (1937) I. L. R. 16 Pat. 290.

Where a decree has been amended, Art. 182, cl. (4) gives a fresh starting point from the date of amendment. The question has arisen whether this sub-clause applies even when the execution of decree is barred at the time of amendment. Earlier decisions held that a decree which had already become time-barred by limitation could not be revived for purposes of execution by a subsequent amendment. (*Ahammad Kutty* v. *Kottakkat Kuttu*[1].)

But this decision and the decisions relied on therein have not been followed subsequently in view of the reasoning of the Judicial Committee in construing Art. 182, cl. (2) of the Act. (See *Nagendra Nath Dey* v. *Suresh Chandra Dey*[2].)

The Madras High Court has specifically ruled that Art. 182 (4) should be read literally as it stands and without inserting into it qualifying words. (*Lakshmikanta Rao* v. *Ramayya*[3].) This practically overrules the earlier decision to the contrary. The present judgment of the Patna High Court

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1. (1932) 64 M.L.J. 251: I.L.R. 56 Mad. 458.
2. (1932) 63 M.L.J. 329: L. R. 59 I.A. 283: I.L.R. 60 Cal. 1 (P.C.).
3. (1934) 67 M.L.J. 904.

is also to the same effect and reliance is placed on the later Madras decision and the decision of the Calcutta Court in *Durga Prosad Das* v. *Kedarnath Nayek*[1].

The proper time for raising an objection that the decree is barred is at the time of the hearing of the application for amendment and objection should be taken to the same. If however the amendment is allowed Art. 182, cl. (4) will apply as it stands and will furnish a fresh starting point for execution.

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1. A.I.R. 1929 Cal. 650.

SURAT COTTON SPINNING AND WEAVING MILLS, LTD. *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL, (1937) L.R. 64 I.A. 176: I.L.R. (1937) Bom. 375 (P.C.).

This decision is important to merchants who consign goods for transit by railways. Risk Note B. form approved by the Governor-General in Council under S. 72 (2) (*b*) of the Indian Railways Act, 1890, fell to be construed in this case. Their Lordships analyse the terms of the proviso and point out first that the contractual obligation of disclosure arises at once upon the occurrence of either of the cases (*a*) or (*b*) mentioned in the document and is not confined to the stage of litigation. The scope and extent of this obligation both before litigation and during trial are next stated in clear terms and it is further pointed out that at the close of the evidence for the Railway administration which has to submit their evidence first at the trial, the consignor can complain to the Court that the obligation of disclosure has not satisfactorily been discharged and the Court can and should decide that matter first and pass the necessary orders. Failure to comply with order of Court so passed would amount to breach of the contractual obligation of disclosure and the Courts will be in a position to grant the aggrieved party such damages as may properly be consequential. Apart from and altogether different from this aspect of the Railway's liability there is the other question of a decision on the merits of the dispute as to whether misconduct of the administration can fairly be inferred from the whole of the evidence on record which is available when the evidence on both sides has been given. The general presumptions under S. 114 of the Indian Evidence Act will at this stage be equally applicable to this action as to any other ordinary action and the Courts will weigh and appreciate the evidence accordingly. In the particular case their Lordships point out how the Railway administration had no justification for withholding the evidence of the material witnesses and that was sufficient in the circumstances to justify a finding that there was misconduct by complicity in the theft of the goods by some servant or servants of the Railway and they accordingly gave a decree to the plaintiff for the value of the articles undelivered.

FIRM DEDHRAJ LACHMINARAYAN *v.* BHAGWAN DAS, (1937) I.L.R. 16 Pat. 306.

The soundness of this decision, in so far as it holds that an application for restoration under O. 41, r. 21, Civil

Procedure Code, can be treated as a review and that an order *dismissing* it will furnish a fresh starting point under Art. 182, cl. (3) of the Limitation Act is open to doubt. It is only where there *has been* a review of judgment, that is, where an application for review is *granted* and where the Court thereafter reconsiders the decision and makes a fresh order or decree, that a fresh starting point is given under cl. (3). Even if an application under O. 9, r. 13 or O. 41, r. 21 can be regarded as one for " review" apart from applications which come strictly under O. 47, cl. (3) of Art. 182 will not govern a case where such applications are refused. This aspect of the matter does not seem to have been adverted to in the judgment under notice. The decision in *Kurupam Zamindar* v. *Sadasiva*[1] is a direct decision to that effect and it has been followed by the Patna Court in *Rai Brijraj* v. *Nauratan Lal*[2]. Though this latter judgment of the Patna Court is noticed in the present judgment and dissented from the distinction between cases of dismissal of the application and cases where the application is ordered is not noticed.

Another question raised and discussed in the above decision is as to the applicability of cl. (2) of Art. 182, in cases where the appeal is not against the decree sought to be executed but only against an order dismissing an application for rehearing under O. 41, r. 21. Purporting to follow some observations of the Privy Council in *Nagendra Nath Dey* v. *Suresh Chandra Dey*[3] the judgment holds that cl. (2) will apply. This is contrary to several rulings of the High Courts which however were before the said Privy Council decision. It would seem however that the decision of the Privy Council dealt with quite a different set of facts and their general observations are not necessarily applicable to the present case.

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1. (1886) I.L.R. 10 Mad. 66.
2. (1917) 3 Pat.L.J. 119: 44 I.C. 575.
3. (1932) 63 M.L.J. 329: L.R. 59 I.A. 283: I.L.R. 60 Cal. 1 (P.C.).

ABDUL HAQUE *v.* TARABANNEESSA, (1936) [1937] 1 Cal. 569.

The question whether a tenant can acquire by prescription an easement over the property in the holding of another tenant under the same landlord has been the subject of varying decisions in the High Courts in India. The learned Judge has held in the present case in the case of a right to a water-course, that such an easement cannot be acquired by prescription by one tenant against another tenant holding under the same landlord.

It is clear that under the English Common law, there can be no acquisition of an easement by prescription, as an easement can be acquired by one owner in fee against another owner in fee and when both the tenements are in the ownership of the same owner, he cannot acquire any right against himself and a tenant can only prescribe in the right of his landlord. Nor can such an easement be acquired under the doctrine of a lost grant. *See* per P. O. Lawrence, J., in *Cory* v. *Davies*[1] following *Wheaton* v. *Maple & Co.*[2] and *Kilgour* v. *Gaddes*[3]. Even under the English Prescription Act, S. 2, it has been held in these cases that one tenant cannot acquire an easement against another tenant of the same landlord on similar reasoning, though the contrary has been held in Ireland in *Fahey* v. *Dwyer*[4] and *Beggam* v. *M. Donald*[5] and in an earlier English case of *Daniel* v. *Anderson*[6]. With regard to the acquisition of an easement of light to a building, however, under the English Prescription Act, S. 3, it has been held by the House of Lords on the rule of *stare decisis* in *Morgan* v. *Fear*[7] following *Frewen* v. *Phillips*[8] that one tenant can acquire a right to light to his premises against the premises of another tenant under the same landlord. The reasoning for the distinction is that in the case of an easement of light S. 3 does not require that the enjoyment of it need not be "as of right" under S. 3 of the Prescription Act, while in the case of other easements, it has to be as of right under Ss. 2 and 5 of the Act.

In India, the acquisition of easements by prescription under the statutes is governed by the Easements Act in some provinces and by the provisions of Ss. 26 and 27 of the Indian

1. (1923) 2 Ch. 95 at 107.
2. (1893) 3 Ch. 48 at 63.
3. (1904) 1 K.B. 457.
4. (1879) 4 L.R. Ir. 271.
5. (1878) 2 L.R. Ir. 560.
6. (1862) 31 L.J.Ch. 610.
7. (1907) A.C. 425.
8. (1861) 11 C.B. (N.S.) 449.

Limitation Act in the others. The present case being one from Bengal, it is not governed by the Easements Act and the decision is in accord with the English law on the point as stated above. The question whether the provisions of the Easements Act, S. 15 reproduces the law under the English Act has been doubted by Phillips, J., in *Ponmani Chintugath Koyyammu* v. *Kuttiammoo*[1] though the weight of judicial opinion is that both of them are to the same effect. *See* Per Phillips, J., in *Saminatha Mudaly* v. *Velu Mudaly*[2] and *Ponmani Chintugath Koyyammu* v. *Kuttiammoo*[1], per Abdur Rahim, J. Consequently, it has been held that a tenant cannot acquire an easement against his own landlord in *Basavangudy Narayana Kamthy* v. *Lingappa Shetty*[3] and *Bayya Sahu* v. *Krishna Chandra Gajapati*[4] following *Gayford* v. *Moffatt*[5]. See also *Udit Singh* v. *Kashi Ram*[6] and *Mani Chander Chakerbutty* v. *Baikanta Nath Biswas*[7] cases not governed by the Easements Act. As regards tenants under the same landlord acquiring an easements other than one of light, against one another; it has been generally held in this country following *Kilgour* v. *Gaddes*[8], that it cannot be acquired under S. 15 of the Easements Act or S. 26 of the Limitation Act. (*Madan Mohan Chakravarty* v. *Sashi Bhusan Mukherji*[9], *Radha Kishun* v. *Sunder Mal*[10] and *Moni Chandra Chuckrabutty* v. *Baikanta Nath Biswas*[11]). The contrary view held in *Chotey* v. *Dal Chand*[12], we venture to submit, requires reconsideration.

As regards the right to light, it must be noticed that S. 15 of the Easements Act does not require that its enjoyment should be "as of right" as in the case of other easements. It is therefore possible that in the case of an easement of light to a building governed by the Act, a tenant can acquire by prescription against another tenant of the same landlord following *Morgan* v. *Fear*[13] and *Frewen* v. *Philipps*[14]. See *Hari* v. *Mahadeo*[15]. The contrary would seem to be the result under S. 26 of the Limitation Act, as that section does not make any distinction between an easement of light and other easements.

1. (1918) 37 M.L.J. 28: I.L.R. 42 Mad. 567.
2. (1916) 4 L.W. 128.
3. (1919) 38 M.L.J. 28.
4. (1920) 11 L.W. 600.
5. (1868) L.R. 4 Ch. Appeals 133.
6. (1892) I.L.R. 14 All. 185 (F.B.).
7. (1902) I.L.R. 29 Cal. 363.
8. (1904) 1 K.B. 457.
9. (1915) 19 C.W.N. 1211.
10. A.I.R. 1934 Pat. 11.
11. (1902) 9 C.W.N. 856.
12. A.I.R. 1929 All. 862.
13. (1907) A.C. 425.
14. (1861) 11 C.B. (N.S.) 449.
15. A.I.R. 1921 Nag. 127.

BALU SAKHARAM *v.* LAHOO SAMBHAJI, (1936) I.L.R. 1937 Bom. 508 (F.B.).

Some of the new problems that were bound to arise on the decisions of the Judicial Committee reported in *Amarendra Man Singh* v. *Sanatan Singh*[1] and reaffirmed in *Vijaysingji Chhatrasingji* v. *Shivsangji Bhimsangji*[2] were considered by this Full Bench. Conflicting decisions had been given by the Bombay High Court on some of these questions and the conflict of views necessitated a reference to the Full Bench in view of the frequency of such points arising for decision and the importance of settling the same by an authoritative pronouncement. Unfortunately however, there has not been an unanimity of views and the Full Bench decision suffers to that extent. The view of the majority consisting of two Judges is to the effect that the decision of the Bombay Court in *Chandra* v. *Gojarabai*[3] should be deemed to have been overruled by the above Privy Council decision in so far as that case may be taken as laying down that the adoption itself was invalid but only so far and no further. The actual decision that the adopted son cannot divest the heir in whom the estate had actually vested by inheritance to the last male holder long prior to the adoption is still good and that view has been reaffirmed by the majority opinion. This is so notwithstanding the adopted son would have been a preferable heir to the one who actually inherited, if he had been a natural son and in existence at the time when the inheritance opened. It is according to the majority view immaterial if the actual heir is a more remote heir. Still what has been vested in the heir cannot be divested by the later adoption and the decision to the contrary in earlier cases is overruled. Rangnekar, J., however goes further and holds that the adoption itself is invalid and the later Privy Council decisions do not affect the ruling in *Chandra* v. *Gojarabai*[3] and that the power to adopt should be held to be totally extinguished when there is no joint family and the inheritance opens on the death of the last surviving coparcener. According to the learned Judge the Privy Council cases should be confined to adoption made by widows of deceased coparceners only during the existence of

1. (1933) 65 M.L.J. 203: L.R. 60 I.A. 242: I.L.R. 12 Pat. 642 (P.C.).
2. (1935) 68 M.L.J. 701: L.R. 62 I.A. 161: I.L.R. 59 Bom. 360 (P.C.).
3. (1890) I.L.R. 14 Bom. 463.

the coparcenary itself and cannot be extended to other cases. The practical consequences will be different according as the adoption itself is held to be valid or otherwise and the point therefore still remains an open question. Even according to the majority view the later adopted son will have the right of further inheritance, if the heir who had already taken is only a limited owner and the succession has to be traced again from the last male holder.

KEDARNATH GOENKA *v.* MAHARAJ KUMAR BAGESHWARI PRASAD SINGH, (1937) 2 M.L.J. 202: L.R. 64 I.A. 240: I.L.R. 16 Pat. 382 (P.C.).

The rate of interest on 'mesne profits' is, under the Indian statute, left to the discretion of the Court. The Board point out, in this case, that there will ordinarily be no justification to grant different rates of interest for different periods, unless there were special circumstances or special contract to that effect. In cases of conditional orders for stay of delivery of property, there may be a contract or an undertaking. But as regards 'special circumstances' nothing is indicated in the judgment as to what they may be, but in the nature of things it will not be possible to be more precise. The usual Court rate of six per cent. per annum is ordinarily a fair rate and that is what should be allowed normally.

MAHANTH RAMDHAN PURI *v.* MUSAMMAT PARBATI KUER, (1937) I.L.R. 16 Pat. 476.

This judgment proceeds on the footing that the effect of the compromise decree in the previous suit by the preceding shebait was no more than an alienation by him which was accordingly good only for his tenure of office and that it was open to the succeeding shebait to ignore it and claim the alienated properties for the trust. We are not sure that the position is so clear as it was apparently assumed to be by the learned judges. The prior suit was, it may be noted, one questioning on behalf of the trust, alienations of trust properties by a shebait who was the *predecessor-in-office* of the plaintiff. The defence was that the alienations were for purposes binding on the trust. The plaintiff was suing on behalf of the trust and if the compromise decree was not vitiated by

fraud or collusion, such a decree will be *res judicata* and will bind the successor-in-office also. That the compromise decree did not recite that the plaintiff had satisfied himself as to the binding character of the alienation is neither here nor there. A recital one way or another will not conclude the matter if the facts were otherwise. If the defence was not a mere sham or a pretence but was a genuine one, a *bona fide* compromise relating to a hostile assertion of title is within the competence of the litigating shebait and such a compromise decree should ordinarily be held to bind his successors-in-office also. That the shebaits form a continuing representation of the idol was laid down by the Judicial Committee in *Prosunno Kumari Debya* v. *Golab Chand Baboo*[1].

It is clear that at least in cases where in the prior suit issues are raised and fought out without collusion or fraud the judgment should operate as *res judicata.* It may be noted that quite recently the Privy Council has held that under S. 44 of Indian Evidence Act, proof of fraud or collusion only will be allowed to get rid of a prior judgment and that there is no room, in the face of the clear statutory enactment, to allow other invalidating circumstances like 'gross negligence'. (*Venkata Seshayya* v. *Kotiswara Rao*[2].) That a suit on behalf of an idol has been compromised cannot be itself proof of fraud or collusion. Unless it is taken to be beyond the competence of the shebait to bind his successor except by a contested decision, we do not see why a *bona fide* compromise decree by a shebait at any rate of a suit calling in question an alienation by *his predecessor* should not be held to be *res judicata.* In other cases of representative capacity as in the case of a limited owner like a Hindu widow in possession of her husband's estate, a decree on compromise is as efficacious as a contested decision provided of course other legal requirements are satisfied. The same principle should apply to the case of shebaits also litigating on behalf of idols or family deities.

It may be a different question if a like principle is equally applicable to cases of decrees whether on compromise or on contest where the alienating trustee or shebait is himself the party to the suit and it is his act of alienation that is being

1. (1875) L.R. 2 I.A. 145 (P.C.).
2. (1937) 1 M.L.J. 113: L.R. 64 I.A. 17: I.L.R. 1937 Mad. 263 (P.C.).

challenged. It must be borne in mind that in such cases, apart from the obvious dangers of collusion if not of fraud, the principle that a party cannot be permitted to do indirectly what he cannot do directly may apply. Suffering a decree against the trust may in some cases be tantamount to an alienation itself but that apart it is safer to regard those cases as excluding the doctrine of *res judicata* where the party is either not being sued or precluded by law from being sued in his representative capacity at all except where the pleadings are clear to the contrary and the necessary issues are raised and decided. Whether in such cases even where the party sues or is sued in his capacity as trustee, the rule of constructive *res judicata* should be applied is a more difficult question. If the failure to raise the proper questions on behalf of the trust is 'fraudulent', the judgment may be ignored under S. 44 of Evidence Act. Cases of actual decision on points raised may however come within the ordinary rule as to *res judicata*, there being no scope for personal estoppel. See *Srimath Daivasikhamani PonnambalaDesikar* v. *Periyannan Chetti*[1] and it would seem that except under S. 44 of Evidence Act such judgments must bind the successors also. We may draw attention however to the decision in *Basudeo Roy* v. *Mohant Jugal Kishwar Das*[2] where it may be noted that the compromise decrees were effected by the *guardian* of the shebait who was at all material times a minor and they were not treated as *res judicata* in a subsequent suit by the minor after attaining majority. This case must be regarded as coming within the *special* class of cases giving protection to minors against the negligent actings of their guardians. (See *Venkata Seshayya* v. *Kotiswara Rao*[3]).

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1. (1936) 71 M.L.J. 105: L.R. 63 I.A. 261: I.L.R. 59 Mad. 809 (P.C.).
2. (1918) 35 M.L.J. 5 (P.C.).
3. (1937) 1 M.L.J. 113: L.R. 64 I.A. 17: I.L.R. 1937 Mad. 263 (P.C.).

UPENDRA MOHAN PAL CHAUDHURI *v.* NALINI MOHAN RAY CHAUDHURI, (1936) I. L. R. (1937) 2 Cal. 48.

The question in this case is whether a debt due to the judgment-debtor and another can be the subject of attachment by the decree-holder and if so what is the procedure available for the satisfaction of the decree. So far as a debt due to the judgment-debtor and another is concerned, it has been held by the Court of Appeal in England in *Macdonald* v. *Tacquah Gold Mines Company*[1] under O. 45, r. 1 of the Rules of the Supreme Court which corresponds in some respects to O. 21, r. 46, that it is not the subject of an attachment and a garnishee order cannot be passed in respect of it. This decision has been followed in this country in *Haji Abdulla Sahib* v. *Abdul Lathif Saheb*[2] and *Lakshminarain Khettry* v. *Amar Nath Khettry*[3] on the Original Side of the High Court where garnishee proceedings are available. The Calcutta High Court has made rules in the Civil Procedure Code, that is, O. 21, rr. 46-A to 46-H providing for orders against the garnishee in the cases of some debts. It would seem that on the authority of the above cases, there would be no power to pass garnishee orders in cases where the debts are owed to the judgment-debtor and another even in the mofussil in Bengal in the cases of debts falling under O. 21, rr. 46-A to 46-H. Again it has to be noticed that the procedure prescribed for the attachment of debts under O. 21, r. 46 of the Civil Procedure Code, does not seem to be available for a debt owed to the judgment-debtor and another, as O. 21, r. 46 (3) provides that a payment into the attaching Court of the debt will discharge the garnishee which would be inapplicable where the creditor is the judgment-debtor and another. The learned judges in the case under notice had therefore to consider whether such debts were attachable at all and point out that such debts owned by the judgment-debtor and another are attachable under S. 60 of the Civil Procedure Code, just like any other property owned by the judgment-debtor and another. If so and if there is no mode prescribed for the attachment of such debts, the Courts have under their inherent powers preserved under S. 151 of the Civil Procedure Code, the power to attach such debts by passing prohibitory orders against the judgment-debtor and his

1. (1884) 13 Q.B.D. 535. 2. (1920) 39 M.L.J. 91.
3. (1937) 41 C.W.N. 1074.

debtor on the analogy of O. 21, r. 46. That prohibitory order can be passed under the inherent powers of the Court in cases not falling under O. 21, r. 46 has been recognised in *Abdul Ghani* v. *Simla Banking and Industrial Co.*[1] The further procedure in such a case would seem to be that the judgment-debtor's interest in the debt would be sold in execution and the purchaser would be entitled to sue for the debt along with the other part owner of the debt or making him a party defendant to the suit if he will not join as a plaintiff. In the alternative, a Receiver will have to be appointed in execution who will proceed likewise for recovering the debt. It is however not clear how by an examination under O. 21, r. 41 of the Civil Procedure Code, to which the other part owner of the debt will not be a party, the garnishee may be ordered to pay a part of the debt in satisfaction of his indebtedness to the judgment-debtor, as, so far as he is concerned, his indebtedness is entire and indivisible Cf. *Baraboni Coal Concern, Limited* v. *Gokulananda Mohanta Thakur*[2] and the other part owner will not be bound by any decision as to his share of the debt in execution.

SREE SREE ISHWAR NARAYAN JIU *v.* SOLER, (1936) I.L.R. (1937) 2 Cal. 133.

The question in this case is one of procedure as to whether a shebait can apply by petition to the Court for directions regarding alienation of the debutter property on the ground of necessity or benefit. There is hardly any doubt that the matter can be dealt with by a suit under S. 92 of the Civil Procedure Code. It has also been held that the remedy by suit on the analogy of S. 92 is available even in the case of private religious endowments. (*Bimal Krishna Ghosh* v. *Jnanendra Krishna Ghosh*[3].) The learned judge himself recognises that it has been the practice to pass such orders on application. Under these circumstances, there should be strong grounds for departing from the existing practice. Such an order was passed by West, J., in *Kahandas Narrandas*, In re,[4] as early as 1881 under the Indian Trustees Act. A similar order was also passed by the Calcutta High Court in

1. A.I.R. 1932 Lah. 295.
2. (1933) 66 M.L.J. 399: L.R. 61 I.A. 35: I.L.R. 61 Cal. 313 (P.C.).
3. (1937) I.L.R. (1937) 2 Cal. 105.
4. (1880) I.L.R. 5 Bom. 154.

Nilmoney Dey Sarkar, In re[1]. In provinces to which the Indian Trusts Act has been made applicable, S. 43 of the Trustees and Mortgagees' Powers Act (XXVIII of 1866) providing for trustees approaching the Court by petition for directions has been amended by deleting the provision in the case of trustees. (Cf. *Sir Curimbhoy Ebrahim*, In re[2].) The Indian Trusts Act has however provided for the trustees of private trusts applying for the directions of the Court by application in Ss. 34 and 74 of the Act. In this connection, it must be pointed out that even in cases of public trusts to which the Indian Trusts Act does not apply, it has been held that the trustees can no longer apply for directions under the Trustees and Mortgagees Powers Act. (See *Sir Dinsha Manekji Petit* v. *Sir Jamsetji Jijibhai*[3].) These considerations, however, have no application to Bengal as the Indian Trusts Act has not been extended to Bengal.

Again, it has to be observed that in the case of wakfs, it was held by Pugh, J., in *Halima Khatun*, In re,[4] differing from *Kahandas Narrandas*, In re,[5] that an application could not be made to the Court for directions but that the matter should be brought up only by a suit under S. 92 of the Civil Procedure Code. This view of Pugh, J., was dissented from by a Bench of the Calcutta High Court in *Habibar Rahaman* v. *Saidannessa Bibi*[6] which held that there was no reason to depart from the pre-existing practice of dealing with such matters on a petition. The same view has also been taken by the Allahabad in *Askari Hussain* v. *Chunni Lal*[7]. As in the case of wakfs, the ownership of the property is transferred to the Almighty, so in the case of debutter property, the property vests in the deity and the shebait like the mutwalli is only a manager on behalf of the deity. (Cf. *Vidya Varuthi Thirtha* v. *Balusami Aiyar*[8]). If in the case of wakfs, an application can be made to the Court for directions as to alienation, etc., and a suit is not necessary as laid down in *Habibar Rahman* v. *Saidannessa Bibi*[6] and *Askari Hussain* v. *Chunni Lal*[7] referred to above, there seems to be no reason why the practice in the case of

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1. (1904) I.L.R. 32 Cal. 143.
2. (1910) I.L.R. 35 Bom. 380 (382).
3. (1908) I.L.R. 33 Bom. 509.
4. (1910) I.L.R. 37 Cal. 870.
5. (1880) I.L.R. 5 Bom. 154.
6. (1923) I.L.R. 51 Cal. 331.
7. A.I.R. 1929 All. 849.
8. (1921) 41 M.L.J. 346: L.R. 48 I.A. 302: I.L.R. 44 Mad. 831 (P.C.).

the Hindu endowments should be changed and the dilatory procedure by a suit should be adopted. The rule as to adherence to the practice of the Court forcibly pointed out by Sir Asutosh Mookerjee in *Habibar Rahman* v. *Saidannessa Bibi*[1] has, we venture to submit, equal validity in the case of Hindu religious endowments as well.

KARAN SINGH *v.* MUSAMMAT TETAR KUER, (1937) I.L.R. 16 Pat. 422 (F.B.).

This Full Bench decision is in line with the preponderance of authority in the High Courts relating to the applicability of S. 7 of the Limitation Act to cases of suit by managers of a Mitakshara joint family. Where an alienation by a guardian of two brothers is sought to be set aside more than three years after the attainment of majority by the elder brother, S. 7 will prevent the same, with regard to the shares of both the brothers. The Madras High Court held so in *Doraisami Sirumadan* v. *Nondisami Saluvan*[2] and has adhered to that view, even after the decision of the Privy Council in *Jawahir Singh* v. *Udai Parkash*[3].

The other High Courts too have taken a similar view though not without conflicting decisions. It may now be taken as fairly settled that S. 7 will ordinarily be applicable to such cases of joint right, where the eldest son is in a position to give a discharge without the concurrence of the other individual members of the family. The question whether S. 7 will apply to cases of execution proceedings where such an elder member is a next friend of the minor brother is more difficult as to which see *Administrator-General, Madras* v. *Radhakrishnan Chettiar*[4]. *See* Mitra's Limitation Act, Vol. II, pages 750-752.

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1. (1923) I.L.R. 51 Cal. 331.
2. (1912) 25 M.L.J. 405: I.L.R. 38 Mad. 118 (F.B.).
3. (1925) 50 M.L.J. 344: L.R. 53 I.A. 36: I.L.R. 48 All. 152 (P.C.).
4. (1935) 70 M.L.J. 700.